LIBRARY
SUPREME COURT, U.S.

71-1217

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1971
NO.

SOLOMON GOLDBERG, also known as
SAUL GOULD,

Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI
DIRECTED TO THE UNITED STATES
COURT OF APPEALS FOR THE
NINTH CIRCUIT

MORRIS LAVINE
215 West 7th Street
Suite 620
Los Angeles, Calif. 90014
(213) 627-3241

Attorney for Petitioner

TOPICAL INDEX

	Page
Jurisdiction	2
Opinion Below	2
Constitutional Provisions and Statutes Involved	2
The Facts	2
Questions Presented	4
Reasons for Granting the Writ	5
I	
The petitioner was not tried on the indictment as returned by the grand jury but as re-written by the court. His Fifth Amendment right to be tried on the indictment as returned by the grand jury was violated. The indictment therefore no longer stated an offense against the laws of the United States.	5
II	
The indictment failed to charge an offense against the laws of the United States and particularly "mail fraud".	7

Page

III

The settled rule in the federal court is that an indictment may not be amended except by re-submission to the grand jury unless the change is merely a matter of form. (Russell v. U.S., 369 US 749, 8 L.ed.2d 254) 10

IV

Conviction of a person with no evidence whatever in the record to support it is a violation of due process of law. (Shuttlesworth v. Birmingham, 382 US 87, 15 L.ed. 2d 176; Thompson v. City of Louisville, 362 US 199, 4 L. ed.2d 654; Garner v. Louisiana, 368 US 157, 7 L.ed.2d 207) 11

Conclusion 12

APPENDIX

Opinion of the United States Court of Appeals for the Ninth Circuit A

TABLE OF AUTHORITIES CITED

Cases

	Page
Bain, Ex parte, 121 US 1, 30 L.ed. 849	6
Garner v. Louisiana, 368 US 157, 7 L.ed.2d 207	11
Kann v. U.S., 323 US 88, 89 L.ed. 88	5,7,11
Parr v. U.S., 363 US 370, 4 L.ed.2d 1277	5,7,8,9,11
Russell v. U.S., 369 US 749, 8 L.ed.2d 240	6,10
Shuttlesworth v. Birmingham, 382 US 87, 15 L.ed.2d 176	11
Stirone v. U.S., 361 US 212	6
Thompson v. Louisville, 362 US 199, 4 L.ed.2d 654	11
U.S. v. Norris, 281 US 619	6

Constitution

Fifth Amendment, U.S. Constitution	2,5

Statutes

United States Codes	
Title 18, Sec. 2	2
Title 18, Sec. 1341	2,3,4

Page

United States Code (cont'd)

Title 28, Sec. 1254 2

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1971
No.

SOLOMON GOLDBERG, also known as
SAUL GOULD,

Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI
DIRECTED TO THE UNITED STATES
COURT OF APPEALS FOR THE
NINTH CIRCUIT

TO THE HONORABLE WARREN BURGER, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Solomon Goldberg, also known as Saul Gould, respectfully petitions this Honorable Court for a writ of certiorari directed to the Court of Appeals for the Ninth Circuit to review and reverse and render void three judgments, to-wit, on Counts Seven, Eight and Nine, on an indictment on which defendant was tried and convicted and placed on probation for

three years.

JURISDICTION

Jurisdiction is conferred by Title 28, Section 1254, U.S.C.

The decision of the Court of Appeals was rendered February 24, 1972. This petition for certiorari is being filed within 30 days of the decision of the Court of Appeals.

OPINION BELOW

The opinion below is attached hereto as an Appendix A. Petitioner believes that the printed opinion in the official reports has not yet been published.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment - "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, ..."

THE FACTS

Petitioner was indicted in three counts of a 39 count indictment charging several persons with mail fraud in the use of credit cards in violation of Title 18, Sec. 1341, U.S.C., and Title 18, Sec. 2, U.S.C., aiding and abetting.

Because petitioner was charged in only three counts, the court granted a severance of his trial and the trial of Thomas W. Lefner from the other defen-

dants. The case against Lefner was later dismissed before trial.

Briefly, a conspiracy was alleged in Count One, naming several persons in an alleged scheme to purchase air line tickets through credit cards from various air line companies and travel agencies on credit for use by passengers whose names were to be supplied by the defendant Robert S. Kelem (C.T. 3) and that no payment was intended to be made for the tickets.

Petitioner was charged with having made purchases of three air line tickets from United Air Lines through travel agencies on his valid credit card and to have delivered them to Robert S. Kelem, who was operating a discount house and who in turn sold these tickets to three purchasers at a discount. The total amount involved in these three transactions as found by the court in its judgment was $1514.46.

Unlike the other cases involving other defendants, petitioner had paid a small amount on account and agreed with the air lines to pay any amount that it was determined was due, but because of the instruction of his attorney that payment pending litigation might amount to compounding a felony, it was delayed.

Petitioner contended that such delay, if it occurred, did not constitute mail fraud within the provisions of Title 18, Sec. 1341, U.S.C.

The trial court, instead of submitting the case to the trial jury on the indictment as returned by the grand jury, para-

dants. The case against Lefner was later dismissed before trial.

Briefly, a conspiracy was alleged in Count One, naming several persons in an alleged scheme to purchase air line tickets through credit cards from various air line companies and travel agencies on credit for use by passengers whose names were to be supplied by the defendant Robert S. Kelem (C.T. 3) and that no payment was intended to be made for the tickets.

Petitioner was charged with having made purchases of three air line tickets from United Air Lines through travel agencies on his valid credit card and to have delivered them to Robert S. Kelem, who was operating a discount house and who in turn sold these tickets to three purchasers at a discount. The total amount involved in these three transactions as found by the court in its judgment was $1514.46.

Unlike the other cases involving other defendants, petitioner had paid a small amount on account and agreed with the air lines to pay any amount that it was determined was due, but because of the instruction of his attorney that payment pending litigation might amount to compounding a felony, it was delayed.

Petitioner contended that such delay, if it occurred, did not constitute mail fraud within the provisions of Title 18, Sec. 1341, U.S.C.

The trial court, instead of submitting the case to the trial jury on the indictment as returned by the grand jury, para-

phrased Count One of the indictment and omitted a portion of it and omitted a portion of the indictment in each of Counts Seven, Eight and Nine, upon which petitioner was tried. It was petitioner's contention that the alterations, amendments and changes in the indictment as voted by the grand jury rendered it null and void.

It was also the contention of the petitioner that the mailings involved were not caused by petitioner, nor were these mailings for the purpose of executing the scheme within the meaning of Title 18, Sec. 1341.

It was further the contention of the petitioner that there was no scheme involved and that the court should have granted judgments of acquittal.

The evidence was uncontradicted that Saul Gould had paid various sums of money to United Air Lines and had agreed on a settlement of his account with Mr. Meyerhof, a collection agency dealing with and handling United Air Lines collections accounts, but that the settlement had failed due to the activity of Mr. Gould's attorney and would have to await the determination of the trial. (R.T. 266-267)

Mr. Gould told Mr. Meyerhof he would pay the account if Mr. Lavine okayed it. (R.T. 270)

QUESTIONS PRESENTED

1. Whether the failure to try the petitioner by the indictment as returned

by the grand jury violated petitioner's rights under the Fifth Amendment to the Constitution of the United States and rendered the proceedings null and void.

2. Whether the court lost jurisdiction when it attempted to place petitioner on trial on an indictment as amended by the court.

3. Whether the court erred in instructing the jury on the indictment as cut up and paraphrased by the judge. (R.T. 323, et seq.) (Indictment as modified)

4. Whether the indictment charges mail fraud within the meaning of Parr v. U.S., 363 US 370, 4 L.ed.2d 1277, and Kann v. U.S., 323 US 88, 89 L.ed. 92.

5. Whether the petitioner was entitled to judgments of acquittal on each of the three counts.

6. Whether the jury was correctly instructed in response to its question that it sent to the judge during deliberation as follows: "Does the law state that the defendant must knowingly and willfully cause the mails to be used or does the law state that a violation can occur knowingly or not?" (R.T. 350, 353)

7. Whether there is no evidence that Mr. Gould knowingly and willfully caused the mails to be used and therefore his conviction, without any evidence, violates due process of law.

REASONS FOR GRANTING THE WRIT

Petitioner was not tried on the indict-

ment returned by the grand jury but on the indictment as altered and amended by the court, omitting certain portions of the indictment in each count as well as eliminating a portion of Count One which the other counts adopted by reference. This voided the indictment and rendered the trial nugatory. Contrary to the statement in the opinion of the Court of Appeals, an acquiescence by defense counsel, if it occurred, could not make an invalid indictment valid nor could it be legal to try one on an altered indictment. (Ex parte Bain, 121 US 1, 30 L.ed. 849; U.S. v. Norris, 281 US 619; Stirone v. U.S., 361 US 212; Russell v. U.S., 369 US 749, 8 L.ed.2d 240, 255)

In Russell v. U.S., 369 US 749, 770, 771, 8 L.ed.2d 254, 255, the court said:

> "A grand jury, in order to make that ultimate determination, must necessarily determine what the question under inquiry was. To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure. ... 'If it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been call-

ed to suggested changes, the great importance which the common law attaches to an indictment by a grand jury, as a prerequisite to a prisoner's trial for a crime, and without which the Constitution says "no person shall be held to answer," may be frittered away until its value is almost destroyed. ...'"

II

THE INDICTMENT FAILED TO CHARGE AN OFFENSE AGAINST THE LAWS OF THE UNITED STATES AND PARTICULARLY "MAIL FRAUD".

The charge in this case, to-wit, mail fraud, did not state an offense against the laws of the United States. The federal mail fraud statute does not purport to reach all frauds, but only limited instances in which the use of the mail is part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law. (Parr v. U.S., 363 US 370, 4 L.ed.2d 1277, 1291; Kann v. U.S., 323 US 88, 89 L.ed. 88)

As to the petitioner in Counts Seven, Eight and Nine, where billings or sendings of invoices by the travel agencies to the United Air Lines are concerned, nothing in the charges about petitioner caused these billings to be made or that they were for the purpose of executing a scheme or that he had any knowledge of them or that it would make the transaction a violation of the mail fraud statute. (Parr v. U.S., 363 US 370, 393, 4 L.ed. 2d 1277, 1291; Kann v. U.S., 323 US 88,

89 L.ed. 88)

Furthermore, the receipt of tickets by the purchasers from a travel agency terminated the transaction as far as petitioner was concerned and any acts thereafter could not be in furtherance of any scheme to defraud.

Furthermore, the evidence showed that petitioner was negotiating to settle his account with the air line and this whole prosecution was an effort to have the government assist in collections to be made. This is not mail fraud.

When the jury was deliberating it sent down the following note: "Does the law state that defendant must knowingly and willfully cause the mails to be used or does the law state that a violation can occur knowingly or not. Robert A. Biggs, Foreman."

There is no evidence that Mr. Gould knowingly and willfully caused the mails to be used. The testimony is that he had no knowledge as to whether the mails were or were not going to be used and the testimony further is that he had no knowledge that the mails ever actually were used.

The mailing of the three travel agencies was done at a time that Mr. Gould was not present nor did he tell them or inform them as to any use of the mails.

In Parr v. U.S., 363 US 370, 4 L.ed. 2d 1277 at 1289, the Court said:

"'[t]he federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law.' Kann v. United States, 323 US 88, 95, 89 L.ed. 88, 96, 65 S. Ct. 148, 157 ALR 406. Therefore, only if the mailings were 'a part of the execution of the fraud,' or, as we said in Pereira v. United States, 347 US 1, 8, 98 L.ed. 435, 444, 74 S.Ct. 358, were 'incident to an essential part of the scheme,' do they fall within the ban of the federal mail fraud statute."

The court further said in Parr v. U.S., at 4 L.ed.2d 1291:

"Counts 17, 18 and 19 of the indictment relate to a different subject. They charged, and there was evidence tending to show, that petitioners Oscar Carrillo, Sr., and Garza fraudulently obtained gasoline and other filling station products and services for themselves upon the credit card and at the expense of the District knowing, or charged with knowledge, that the oil company would use the mails in billing the District for those things. The mailings complained of in those counts were two invoices, said to contain amounts for items so procured by Carrillo

and Garza, mailed by the oil company, at Houston, to the District, at Benavides, and the District's check mailed to the oil company, at Houston, in payment of the latter invoide. We think these counts are ruled by Kann v. United States (US) supra. Here, as in Kann [t]he scheme in each case had reached fruition' when Carrillo and Garza received the goods and services complained of. 'The persons intended to receive the [goods and services] had received [them] irrevocably. It was immaterial to them, or to any consummation of the scheme, how the [oil company] ... would collect from the [District]. It cannot be said that the mailings in question were for the purpose of executing the scheme, as the statute requires.' 323 US at 94."

III

THE SETTLED RULE IN THE FEDERAL COURT IS THAT AN INDICTMENT MAY NOT BE AMENDED EXCEPT BY RE-SUBMISSION TO THE GRAND JURY UNLESS THE CHANGE IS MERELY A MATTER OF FORM. (RUSSELL V. U. S., 369 US 749, 8 L.ED.2d 254)

The dismissal of Kelem in the last sentence of Count One of the indictment terminated the efficiency and power of Count One in the indictment. Therefore, the allegations in Counts Seven, Eight and Nine reading "The grand jury re-alleges all of the allegations of the

first count of this indictment, except those contained in the last paragraph thereof" no longer has any potency or efficiency. Not only is the court or prosecutor powerless to alter an indictment, but the grand jury also is powerless to incorporate by reference only part of the first count and not all of it.

IV

CONVICTION OF A PERSON WITH NO EVIDENCE WHATEVER IN THE RECORD TO SUPPORT IT IS A VIOLATION OF DUE PROCESS OF LAW. (SHUTTLESWORTH V. BIRMINGHAM, 382 US 87, 15 L.ed. 2d 176; THOMPSON V. CITY OF LOUISVILLE, 362 US 199, 4 L.ed. 2d 654; GARNER V. LOUISIANA, 368 US 157, 7 L. ed.2d 207)

The court should have granted motions for judgment of acquittal made at the end of the government's case and made at the end of the petitioner's case. There was no proof that the mails were a part of the execution of a fraud, "leaving all other cases to be dealt with by appropriate state law". There is no evidence that petitioner knew that the mails were a part of any scheme and that the mails were willfully and knowingly used in the execution of any scheme. (Parr v. U.S., 363 US 370, 393, 4 L.ed.2d 1277, 1291; Kann v. U.S., 323 US 88, 89 L.ed. 88)

The evidence was also insufficient to prove that there was any scheme. Nothing in the testimony of Kelem

revealed any scheme or any scheme to defraud. There was no evidence of any scheme. The court said that it took two people, the defendant and another, to make a scheme. "It had to be Gould and Kelem devising a scheme." (R.T. 293) But the government dismissed the case against Kelem in Count One, thus establishing that there was no scheme as to Gould alone. It is like a retraxit in a civil case, or the elimination of one of two people when they are charged with a conspiracy, leaving only one, and there cannot be a "scheme" with only one person left, in any event.

Therefore, the court should have granted the judgments of acquittal as requested by the defense counsel. (C.T. 86-96)

(Motions for acquittal as to Counts Six, Seven and Eight are on C.T. 86, et seq.; denied at C.T. 96)

CONCLUSION

WHEREFORE, petitioner prays for the granting of a writ of certiorari and an order reversing the judgment as to each count and an order to dismiss the cause for want of a valid indictment as returned by the grand jury and for want of any evidence justifying the convictions and further because the mail fraud statute is not meant to apply under the facts of this case.

Respectfully submitted,

MORRIS LAVINE

Attorney for Petitioner

APPENDIX A

NO. 71-1513
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff and Appellee,

vs.

SOLOMON GOLDBERG, also known as SAUL GOULD,

Defendant and Appellant.

[February 24, 1972]

On Appeal from the United States District Court for the Central District of California

---

Before: BROWNING and TRASK, Circuit Judges; and BATTIN,* District Judge

PER CURIAM:

Appellant was charged with three counts of mail fraud in violation of 18 U.S.C. Sec. 1341. He was found guilty and convicted on all three counts. The indictment charged that appellant purchased airline tickets from United Airlines on a credit card with

---

*Honorable James F. Battin, United States District Judge, District of Montana, sitting by designation.

no intention of paying the charges incurred. He then sold the tickets at a reduced rate to defendant Kelem, who in turn sold them at reduced rates to the public.

Three basic issues are presented on appeal:

1. Whether the trial court erred in deleting portions of the indictment when read to the jury, both at the beginning of the trial and during the giving of instructions;

2. Whether the indictment properly charged mail fraud in violation of 18 U.S.C. Sec. 1341;

3. Whether the evidence was sufficient to support guilty verdicts.

When the court read the indictment to the jury, it omitted references to Kelem as an aider and abettor in Counts Seven, Eight and Nine and omitted parts of Count One in the indictment which referred also to Kelem. Appellant did not object to these omissions, but rather expressed agreement with the court's action. Assuming the issue to be properly before the court, it is without merit, since it is only necessary that the jury be fairly apprised of the nature of the charge, and that does not necessarily require a reading of the indictment to the jury either in whole or in part. Robles v. United States, 279 F.2d 401, 403-04 (9th Cir. 1960). This requirement was met.

The essential elements of mail fraud

under 18 U.S.C. Sec. 1341 are (1) a scheme to defraud and (2) a knowing use of the mail to execute the scheme. United States v. Regent Office Supply Co., 421 F.2d 1174, 1180 (2nd Cir. 1970). Those elements were charged in the indictment. It is not necessary to show that reliance of the victim was induced by misrepresentation of the defendant, nor is it necessary to show that the victim was misled. Regent, supra, at 1180-81; Erwin v. United States, 242 F.2d 336, 337 (6th Cir. 1957).

The evidence introduced was sufficient to support a conviction under the indictment. See United States v. Kelem, 416 F.2d 346 (9th Cir. 1969).

Affirmed.